

IN THE MATTER OF MERCHANT MARINER'S DOCUMENT NO. Z-1074134 AND  
ALL OTHER SEAMAN'S DOCUMENTS

Issued to: David H. DAVIS

DECISION OF THE COMMANDANT  
UNITED STATES COAST GUARD

1881

David H. DAVIS

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 14 January 1970, an Examiner of the United States Coast Guard at Seattle, Washington, suspended Appellant's seaman's documents for five months plus five months on nine months' probation upon finding him guilty of misconduct. The specifications found proved allege that while serving as an oiler on board SS DA GAMA under authority of the document above described, Appellant:

- (1) on 25 October 1969, at sea, failed to perform his assigned duties;
- (2) on 23 and 24 November 1969, at Can Ranh Bay, RVN, absented himself from the vessel without permission;
- (3) on 6, 7, 8, and 11 December 1969, at Sasebo, Japan, absented himself from the vessel without permission.

At the hearing, Appellant did not appear. The Examiner entered a plea of not guilty to the charge and each specification.

The Investigating Officer introduced in evidence voyage records of DA GAMA.

There was no defense.

At the end of the hearing, the Examiner rendered a written decision in which he concluded that the charge and specifications had been proved. The Examiner then entered an order suspending all documents issued to Appellant for a period of five months outright plus five months on nine months' probation.

The entire decision was served on 24 February 1970. Appeal was timely filed on same date. Although Appellant had until 4 May

1970 to add to his statements on appeal he has not done so.

#### FINDINGS OF FACT

On all dates in question, Appellant was serving as an oiler on board SS DA GAMA and acting under authority of his document. On the dates in question Appellant committed the acts of misconduct as alleged in the specifications found proved.

#### BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. It is contended that the Examiner's order is too severe, in view of the fact that Appellant "did not have a log or a mark against my record for over 10 years," and constitutes a hardship to Appellant and his family.

APPEARANCE: Appellant, pro se.

#### OPINION

##### I

The hardship caused to an appellant's family by an order of suspension is not a reason to disturb an otherwise appropriate order. Decision on Appeal No. 1666. That element of Appellant's grounds for appeal must be rejected.

##### II

In support of his assertion that the order is too severe for the misconduct found proved, Appellant asserts that for ten years he has not had "a log or a mark against my record..." Appellant's statement is unsworn.

The Examiner noted that Appellant's record contained an order entered on 7 July 1969 at Portland, Oregon, calling for a four month suspension on nine months' probation, and held that the misconduct in the instant case violated the probation ordered. Normally this is enough to require a suspension of four months and to justify an addition thereto. However, in this case, the transcript reflects that the prior record was not received in open hearing and the Examiner's opinion does not indicate how or when he obtained the record.

In many cases this would call for a rehearing before another examiner since the record does not exclude the possibility that the Examiner was apprized of the prior record before findings with a resultant influence upon his considerations. Such drastic action

is not required in this case because the evidence of Appellant's misconduct is so overwhelming that any other findings by the Examiner would have been arbitrary and capricious regardless of when the Examiner became aware of the prior record.

### III

Under some circumstances I might take official notice of Appellant's record. I am not inclined to do so in this case. Because of the nature of the Examiner's error Appellant is entitled to some relief. The simplest form it can take is to disregard the order of probation in the 1969 case.

### CONCLUSION

I conclude that the specifications and charge in this case have been proved by substantial evidence, and that the Examiner's findings should be supported. However, the Examiner's order, attacked by Appellant as too severe, must be modified to correct the Examiner's error. The modification will be to treat the matter as though there was no violation of probation.

### ORDER

This findings of the Examiner made at Seattle, Washington, are AFFIRMED. The order of the Examiner is MODIFIED to provide for a suspension of one month, plus five months on nine months' probation, and, as MODIFIED, is AFFIRMED.

C. R. BENDER  
Admiral, United States Coast Guard  
Commandant

Signed at Washington, D. C. this 13th day of June 1972.

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